Asher Candy, Inc. and Sherwood Brands, Inc., LLC, a single employer *and* Local 102, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL–CIO. Case 29–CA–26761

October 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On November 3, 2005, Administrative Law Judge Howard Edelman issued the attached decision. The Respondents filed exceptions and a supporting brief; the General Counsel filed an answering brief; and the Respondents filed a reply brief to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order[2] as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Asher Candy, Inc. and Sherwood Brands, Inc., LLC, a single employer, New Hyde Park, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide to Local 102, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL–CIO (the Union), adequate notice of a layoff of employees from, and closure of, Respondent Asher Candy and an opportunity to bargain concerning the effects of those decisions.

(b) Refusing to pay its employees severance and vacation pay consistent with the terms established by the Union's most recent collective-bargaining agreement with Respondent Asher Candy.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union about the effects of its decision to lay off its employees and close Respondent Asher Candy's facility.

(b) Pay backpay to the laid-off employees in the manner set forth in the remedy section of this decision.

(c) Make whole their employees for their failure to pay severance and vacation pay consistent with the terms established by the Union's most recent collective-bargaining agreement with Respondent Asher Candy as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

[1] We affirm the judge's finding that the Respondents Asher Candy and Sherwood Brands constitute a single employer. We find that at least three of the four criteria that the Board uses to determine single employer status are present in this case. See *Radio & Television Union v. Broadcast Service*, 380 U.S. 255, 256 (1965). In addition to their admitted common ownership and common management, the Respondents share the critical factor of centralized control of labor relations. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

Although the Respondents contend that Asher Candy's general manager and human resources director made day-to-day personnel decisions, Uziel Frydman, Sherwood Brands' president, chief executive officer, and chairman of the board made major decisions concerning labor relations for Asher Candy. See *Good Life Beverage Co.*, 312 NLRB 1060, 1073 (1993); *Soule Glass & Glazing Co*., 246 NLRB 792, 795 (1979). Frydman admitted that either he or the Sherwood Brands board had to approve collective-bargaining agreements, the wage terms of the parties' memorandum of agreement, and nonemergency overtime, severance, layoff, and plant closure decisions for Asher Candy. See *Naperville Ready Mix, Inc*., 329 NLRB 174, 180 (1999), enfd. 242 F.3d 744 (7th Cir. 2001), cert. denied 534 U.S. 1040 (2001); *American Stores Packing Co*., 277 NLRB 1656, 1657 (1986). In addition, the Respondents admitted that Sherwood Brands made pension contributions, paid health insurance, deducted union dues, and funded the payroll for Asher Candy. See, e.g., *Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 873 (1999). Based on this evidence, we agree with the judge that the General Counsel proved the existence of centralized control of labor relations.

We need not reach the issue of whether the parties' memorandum of agreement extended the terms of the expired 1999–2002 contract because the terms and conditions of employment established by that contract survived its expiration. *NLRB v. Katz*, 369 U.S. 736 (1962); *Inner City Broadcasting*, 281 NLRB 1210 (1986).

[2] We agree with the judge that a remedial order consistent with *Transmarine Navigation Corp*., 170 NLRB 389 (1968) is appropriate. But we leave to compliance the relationship between the Order's *Transmarine* remedy and its make-whole provisions ordering payment of severance and vacation pay by the Respondents. See *Sawyer of Napa, Inc*., 321 NLRB 1120, 1121 fn. 3 (1996), and cases cited therein. Cf. *Brandau Printing,* 342 NLRB 867, 868 (2004).

Chairman Battista observes that, although the Respondents were obligated to pay severance only if severed employees lost employment in the industry subsequent to plant closure, the Respondents did not argue that the severed employees retained employment in the industry after the plant closed.

[3] We have modified the judge's recommended order to more closely conform to the Board's standard remedial language. We have also substituted a new notice to employees to comport with these modifications.

form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at their own expense, and after being signed by the Respondents' authorized representative, signed and dated copies of the attached notice marked "Appendix"[4] to all unit employees who were employed by Respondent Asher Candy during the years 2004 and 2005.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to provide Local 102, Bakery, Confectionery, Tobacco workers and Grain Millers International Union, AFL–CIO (the Union), with adequate notice of a layoff of employees from, and closure of, Asher Candy, Inc. and an opportunity to bargain concerning the effects of those decisions.

WE WILL NOT refuse to pay our employees severance and vacation pay consistent with terms established by the Union's most recent collective-bargaining agreement with Asher Candy, Inc.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain in good faith with the Union on request about the effects of our decision to lay off our employees and close Asher Candy, Inc.'s facility.

WE WILL pay backpay to our laid-off employees, with interest.

WE WILL make whole our employees for our failure to pay severance pay and vacation pay consistent with the terms established by the Union's most recent collective-bargaining agreement with Asher Candy, Inc., with interest.

ASHER CANDY, INC. AND SHERWOOD BRANDS, INC., LLC

Nancy Lipin, Esq., for the General Counsel.
Uziel Frydman, President (Sherwood Brands, Inc.), for the Respondent.
Ray Aquilino, Business Agent, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried in Brooklyn, New York, on May 24, 25, and June 1, 2, and 3, 2005.

On February 2, 2005 and on April 11, 2005, Local 102, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union AFL–CIO (the Union), filed charges against Asher Candy, Inc. and Sherwood Brands, Inc., a single employer.

Consistent with these charges the Regional Director for Region 29 issued on April 12, 2005, a complaint and amended complaints on May 24 and June 1, 2005 alleging violations of Section 8(a)(1) and (5) of the Act.

The issues presented in the complaints are whether Respondent Asher and Respondent Sherwood are a single employer.

Whether Respondent Employers, as a single employer failed to provide severance and accrued vacation pay upon the closure of Respondent Asher, as provided by its collective-bargaining agreement between Respondent Asher and the Union in violation of Section 8(a)(1) and (5) of Act.

Whether Respondent Employers closed the Respondent Asher facility without notice to the Union and laid off its total work force without giving the Union the opportunity to bargain about the affects of such action.

It is admitted in Respondents answer that at all material times, Respondent Asher, a domestic corporation, with its principal office and place of business located at 1815 Gilford Avenue, New Hyde Park, New York (the New Hyde Park facility), has been in the business of manufacturing and selling candy canes in the State of New York, and that during the past year, which period is representative of its annual operations generally, Respondent Asher, in the course and conduct of its operations, purchased and received at its New Hyde Park facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New York.

It is also admitted that at all material times, Respondent Sherwood, a domestic corporation, with its principal office and place of business located at 1803 Research Boulevard, Suite

[4] If this Order is enforced by a judgment of a United Sates court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

201, Rockville, Maryland (the Maryland facility), has been engaged in the business of manufacturing and marketing confectionary products, and that during the past year, which period is representative of its annual operations generally, Respondent Sherwood, in the course and conduct of its operations, purchased and received at its Maryland facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Maryland.

I find that Respondent Employers are engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted that Uziel Frydman is the president of both Respondent Asher and Respondent Sherwood. In addition, Frydman tried this case on behalf of Respondent Employers.[1]

It is admitted that Christopher J. Willi is the chief financial officer for both Respondent Asher and Respondent Sherwood.

It is also admitted that James Spampinato is the general manager of Respondent Asher.

It is also admitted that the above-named individuals are supervisors within the meaning of Section 2(11) of the Act.

The relevant facts of this case, with the exception of when or if Respondent Employers gave notice to the Union of its intention to lay off and close the Asher facility, were entirely admitted by Frydman in his opening statement, and by questions put to him, Willi and Spampinato by General Counsel, pursuant to Federal Rules of Procedure 611(c), and testimony by Frydman, Willi and Spampinato when presenting their case, as well as cross-examining General Counsel's witnesses.

Over the last approximately 20 years, Asher had several different owners. In April of 2002, Respondent Sherwood bought Asher. At the time of the purchase, Jim Spampinato and several partners owned Asher. Spampinato, a longtime Asher employee, has held various positions with Asher, including president, plant manager, operations manager, and comptroller. After Sherwood bought Asher, Spampinato worked as Respondent Asher's general manager. In his capacity as general manager, he was responsible for the day-to-day operations of the plant. Asher generally operated on a seasonal basis, hiring employees from January through April, and laying employees off in and around October. Asher's work force was very stable and there were many long-term, skilled employees who returned year-after-year to make and ship candy canes. In addition, there was no history of strikes or other labor unrest at Asher. Respondent Asher's New Hyde Park facility closed on October 29, 2004.

Respondent Sherwood manufacturers, markets and distributes numerous lines of candies, cookies, and gift baskets. Until March of 2005, Respondent Sherwood was publicly traded on the American Stock Exchange. Respondent Sherwood has several subsidiaries, including facilities located in Virginia, Massachusetts, Rhode Island, Maryland, and the 2002 purchase of Respondent Asher. After Respondent Asher closed, the manufacturers of candy canes formerly manufactured by Respondent Asher are now manufactured at Respondent Sherwood's facilities in Brazil.

[1] Frydman is not an attorney.

The Union represented the employees at the Asher facility since 1992, in a unit consisting of:

> All full-time and part-time production and maintenance employees including all temporary employees, excluding office sales employees and supervisors as defined in Section 2(11) of the Act.

When Respondent Sherwood purchased Respondent Asher it assumed the union contract which expired on June 30, 2002.

Shortly before this contract expired, Ray Aquilino, the union representative negotiated with Willi and Spampinato and executed a signed document titled "Memorandum of Agreement between Local 102 and Asher." The first provision in the MOA states: "Terms of contract—3 years." There were five other terms, four of which related to wages, and one to a "Rest Period."

The Union contends that the MOA was a continuation of the 1999–2002 collective-bargaining agreement as modified by the MOA, and expired on June 30, 2005.

Frydman, representing Respondent Employers contends that the contract expired June 30, 2002, and was not renewed, that there was no existing collective-bargaining agreement after June 30, 2002. In this connection he makes two contentions. First that the MOA was not titled as a collective-bargaining agreement and therefore the MOA means nothing. Secondly, he contends that neither he nor Willi signed a document titled collective-bargaining agreement a contract between the Union and Respondent Asher. It is true that the Union prepared a single document which contained the provisions of the 1999–2002 agreement and the modifications set forth in the MOA with an expiration date of June 30, 2005, which Willi, Frydman, and Spampinato refused to sign. Notwithstanding their signatures on the terms of the MOA, I find the MOA which provides a term of 3 years is clearly a collective-bargaining agreement which includes all the 1999–2000 terms as modified by the MOA.

Moreover, when Frydman was examined by counsel for the General Counsel he admitted the terms of 1999 bargaining agreement as modified by the MOA were being complied with. Spampinato also admitted under cross-examination that all the terms of the 1999–2002 agreement as modified by the MOA, were being complied with "until this problem about the severance package." Frydman specifically admitted that vacation pay was due under the MOA as modified by the 1999–2000 collective-bargaining agreement, herein called "Respondent Asher's collective bargaining agreement," and testified that it would be paid stating that, "the amount is not too much." To date accrued vacation pay has not been paid to the employees.

Further evidence that Frydman knew he was liable for the severance pay is set forth in Respondent Employers' Securities Exchange Commission, (SEC) Form 10K dated October 28, 2004, signed by Frydman within a few days after Asher's closure on October 29, 2004 states:

> As of October 8, 2004, the Company had approximately 61 full-time employees and approximately 112 part-time or seasonal employees. Of the Company's full-time workforce, 16 are located at the Company's principal office in Rockville, MD. The Company has approximately 36 full and part-time

> employees in Virginia, approximately 75 full, part-time and seasonal employees in Rhode Island and Massachusetts and 46 full, part-time and seasonal employees in its New Hyde Park, NY facility. Management believes that the Company's relationship with its employees is good. The 40 employees at the Asher Candy facility are the Company's only employees represented by labor unions under a collective-bargaining agreement. The closure of the Asher Candy facility in New Hyde Park, New York, in November 2004 will have an effect on the entire 40 employees at the facility. The Company will provide the required State of New York timetable for severance associated with each remaining employee under the union contract at the time the facility is closed. The Union contract stipulates that severance will be based on seniority of employment at the New Hyde Park, New York facility. The potential liability to the Company for severance could be up to approximately $155,000. [Emphasis added.][2]

I conclude Respondent Employer's failure to pay severance and vacation pay is a unilateral change in violation of Section 8(a)(1) and (5) of the Act. See *Champion International Corp.,* 339 NLRB 672 (2003), a case similar to this instant case, finding that the failure to pay employees earned vacation pay, and unilaterally implementing preconditions for severance pay are unilateral changes in violation of Section 8(a)(1) and (5) of the Act.

Closure of Respondent Asher

Frydman and Spampinato admitted under cross-examination by the General Counsel that they laid off the employees and effectively closed the Asher facility on October 29, 2004. Spampinato admitted that he knew "a while before" the actual closure date was scheduled to take place. Frydman admitted he never informed the Union of the closure, although it was he who made the decision to close the Asher facility sometime before Spampinato had knowledge.

Aquilino credibly testified he first became aware of the closure of the Asher facility on or about October 29. When he visited the Asher facility he observed that a few employees were moving machinery about. It was clear that production was over.

I find at this time October 29, the deed was done and that effective bargaining could not take place. *First National Maintenance Corp.,* 452 U.S. 666, 681 (1981).

Moreover, under these circumstances, the Union cannot be found to have waived any right to bargain as Respondent Employers presented it with a fait accompli. See, e.g., *Champion International Corp.,* 339 NLRB 672 fn. 29 (2003), and cases cited therein. I find that Respondent Employers violated Section 8(a)(1) and (5) of the Act in this regard.

To remedy this violation it is requested that Respondent Employers be ordered to bargain with the Union, on request, about the effects of its decision to close. In addition, Respondent Employers should be ordered to pay backpay to the laid off employees in the manner prescribed in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968).

[2] This SEC form is also evidence of a single employer.

The Single Employer Issue

The criteria that establish a single employer are set out in *RBE Electronics of S.D., Inc.,* 320 NLRB 80 (1995), and *Mercy Hospital of Buffalo,* 336 NLRB 1284 (2001), as follows:

> The Board applies four factors in evaluating whether two entities constitute a single Employer: 1) interrelation of operations; 2) common management; 3) centralized control of labor relations and 4) common ownership or financial control. *Hydrolines, Inc.,* 305 NLRB 416, 417 (1991).

No one factor is controlling, and all factors do not have to be met in order for two entities to constitute a single employer. However, the Board has held that the first three factors are the most significant, and the third factor—centralized control of labor relations—is "of particular importance because it tends to demonstrate 'operational integration.'" *RBE Electronics of S.D., Inc.,* supra; *Hydrolines, Inc.,* supra; *Mercy Hospital of Buffalo,* supra.

During this 5-day trial Frydman, acting as the representative of Respondent during his opening statement, his testimony under Section 611(c) and his own testimony in defense of the allegations alleged in the complaint, made admission after admission which was corroborated by the testimony of Willi and Spampinato. Given all the evidence it is clear that Respondent Employers constitute a single employer under the requirements of *RBE Electronics,* supra.

In addition, there were voluminous records submitted by both the General Counsel and Respondent that corroborate the testimony in the trial record.

There is no credibility as to the facts relating to the single employer issue.

Counsel for the General Counsel in her brief, concisely states as follows:

> In this case, the record evidence is clear that there is no arm's length relationship between Respondent Employer, and all four factors used to evaluate single employer status are present. First, the top management at Respondent Sherwood and Respondent Asher are the same—Uziel Frydman, Amir Frydman and Chris Willi—and Respondent Sherwood made all pension and dues payments to the Union on Sherwood Brands checks, approved all expenditures of any significance, processed and funded Respondent Asher's payroll from a Sherwood corporate account, transferred employees among its facilities, made the decision to eliminate certain shifts and approved overtime hours in non-emergency situations. Respondent Sherwood also made the decision to close Respondent Asher and not pay severance to the employees. In several recent documents filed with the SEC, Respondent Sherwood consistently characterized Respondent Asher as part of Sherwood itself. Its website also shows that Sherwood markets its products, including Asher Candy Canes, as Sherwood Brands products and directs its message to Sherwood Brands customers.

Based on the above, it is clear that all four factors have been met and that Respondent Employers cannot, under any view of

the undisputed facts, be considered to have an arm's length relationship.

Respondent's defense to this entire case was essentially that he, Frydman, had an absolute right to terminate the Asher facility, of Sherwood's facilities without notice to the Union, and that such termination would exclude any contract liability. Respondent's reason for the closure of the Asher facility was that the price of sugar in the United States was too high and much cheaper in Brazil.

Accordingly, I conclude that Respondent Asher and Respondent Sherwood are a single employer and as such was bound by the terms of the 1999–2002 agreement as modified by the MOA which expired in June 30, 2005.

Accordingly, I find that Respondents are required to meet the obligations of the collective-bargaining agreement and pay to its employees, vacation pay and severance pay as set forth in the bargaining agreement.

Additionally, I find the failure to make such payments constitute unilateral changes in violation of Section 8(a)(1) and (5) of the Act. See *Champion International Corp.,* supra.

CONCLUSIONS OF LAW

1. At all times material herein Respondent Asher is an employer as defined in Section 2(2), (6), and (7) of the Act.

2. Respondent Sherwood is an employer as defined in Section 2(2), (6), and (7) of the Act.

3. At all times material herein Respondent Asher and Respondent Sherwood constitute a single integrated business enterprise and a single employer within the meaning of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. At all times material herein, Respondent Asher and Respondent Sherwood have been parties to a collective-bargaining agreement with the Union, covering a unit of Respondent Asher's employees:

> All full-time and part-time production and maintenance employees, including all temporary employees, excluding office sales employees and supervisors as defined by Section 2(11) of the Act.

6. On or about October 29, 2004, Respondent Employers terminated Respondent Asher's business operations and laid off its unit employees without notice to the Union of the termination of its business operations and the layoff of its employees[3] in violation of Section 8(a)(1) and (5) of the Act.

7. Respondent Employers failed to pay to Respondent Asher's employees, accrued vacation pay and severance pay as set forth in Respondent Asher's collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act.[4]

REMEDY

Having found Respondent Employees have engaged in the unfair labor practices described above I shall recommend an Order requiring Respondent Employers to cease and desist and to take certain affirmative action described below.

1. With respect to the termination and closure of Respondent Asher facility Respondent Employers must bargain with the Union on request, about the effects of its decision to close the Asher facility. In addition, Respondent Employers shall be ordered to pay backpay to the laid-off unit employees in the manner set forth and prescribed in *Transmarine Navigation Corp.,* supra.

2. Pay to its employees all vacation and severance pay due pursuant to the terms of the parties' collective-bargaining agreement.

3. With respect to Respondent Employers layoff of employees and its failure to pay its employees accrued vacation pay and severance pay pursuant to the terms of Respondent Asher's collective-bargaining agreement with the Union, backpay, vacation pay and severance pay will be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1956), with interest as prescribed by *New Horizon for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

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[3] Approximately four unit employees worked until on or about early February 2005 moving machinery and performing cleaning operations. Production work ceased on October 29, 2004.

[4] By a facsimile dated October 9, 2005, Respondent Employers state that during the week of October 10, 2005 they will pay accrued vacation pay.